

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

ROBERT HEIBEL,

Plaintiff,

Case No. 08-13078

v.

DIRECTOR PATRICIA
CARUSO, et al.,

Hon. Marianne O. Battani

Magistrate Judge Mona K. Majzoub

Defendants.

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**ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND
RECOMMENDATION AND DENYING PLAINTIFF'S OBJECTION**

Plaintiff Robert Heibel, who is a state prisoner, filed this action *pro se* alleging that his civil rights had been violated. The Court dismissed several defendants pursuant to 28 U.S.C. § 1915 (e)(2), for failure to state a claim upon which relief could be granted. The Court ordered Plaintiff to submit additional copies of his complaint so that service upon the remaining Defendants could be effectuated.

Plaintiff subsequently filed a request for clerk's entry of default against the remaining Defendants, which was denied because no summons was returned. After the Court referred this action to Magistrate Judge Majzoub for all pretrial proceedings, Heibel filed a Motion for Default Judgment.

In a Report and Recommendation ("R&R") dated October 30, 2008, Magistrate Judge Majzoub recommended that the motion be denied because Plaintiff failed to carry his burden of showing that Defendants have been served properly. See Doc. No. 16, R&R at 2. This Court agrees.

The court's docket shows that the U.S. Marshal acknowledged receipt of process from the Clerk on August 22, 2008. There is no entry showing that Defendants have been served with process; however, counsel for the remaining Defendants entered an appearance on October 22, 2008. Defendants filed a Motion to Dismiss pursuant to FED. R. Civ. P. 12(b)(6) on that date as well. See Doc. Nos. 13-15. The motion delays the time in which a defendant must serve an answer. See FED. R. Civ. P. 12(a)(1)(A).

Under 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2), a party seeking review of a magistrate judge's report and recommendation is required to act within ten days of service of the R&R. In his objection, Heibel asks the Court to order the United States Marshal to submit an affidavit of proof of service for the record.

The Court has reviewed the pleadings, the governing rules, and the R&R *de novo*. The Court finds the R&R accurately articulates the law and presents a well-reasoned analysis of the application of governing law to the facts of this case. Defendants have filed a dispositive motion, and Plaintiff has filed a response. There is no basis for entering a default judgment in this matter. Likewise there is no basis for granting Plaintiff's request for an affidavit. The Federal Rules of Civil Procedure do not require an affidavit when service is made by a "United States marshal or deputy marshal." FED. R. Civ. P. 4(l)(1). The Court declines to require an affidavit in contravention of the rules.

Accordingly, the Court **REJECTS** Plaintiff's Objection, **ADOPTS** the Report and Recommendation.

IT IS SO ORDERED.

s/Marianne O. Battani

MARIANNE O. BATTANI
UNITED STATES DISTRICT JUDGE

DATE: November 13, 2008

CERTIFICATE OF SERVICE

Copies of this Order were served upon Plaintiff and counsel of record on this date.

s/Bernadette M. Thebolt
Deputy Clerk